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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Petitioners,

VS.

MOBILE STEAMSHIP ASSOCIATION, INC. and ROBERT E. MALONE,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF WESTWIND AFRICA LINE, LTD. AS *AMICUS CURIAE*

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BRIEF OF *AMICUS CURIAE*

Consent of Parties

All parties in this case have given their written consent to the filing of this brief. The written consents have been filed with the Clerk of this Court.

Interest of *Amicus Curiae*

Westwind Africa Line, Ltd. is a Liberian corporation engaged in the business of international shipping between various foreign countries and the United States. It owned

the Liberian flag vessel Northwind, which was picketed in the Port of Houston, Texas, and was one of the parties before this Court in the case arising out of that picketing, *Windward Shipping (London) Limited* v. *American Radio Association, AFL-CIO*, 415 U. S. , 94 S. Ct. 959 (1974). *Windward Shipping* held that the jurisdiction of a state court to rule on an application by the owners of foreign flag ships for injunctive relief against picketing identical to the picketing in this case, but which occurred in another port, was not pre-empted by the Labor-Management Relations Act.

Westwind Africa Line, Ltd., and all other foreign owners of foreign-flag vessels, are vitally interested in the outcome of this litigation because it presents the issue, not reached in the *Windward Shipping* case, of federal constitutional limitations on the power of the States to regulate picketing of foreign flag vessels. Since this is the nature of Westwind Africa Line Ltd.'s interest, this brief does not discuss the pre-emption question raised by petitioners but is addressed to the issues raised in part II of petitioners' brief relating to picketing and the free speech protections of the First and Fourteenth Amendments to the Constitution.

Statement of the Case

The Picketing

A strike by the International Longshoremen's Association (ILA) shut down the port of Mobile on October 1, 1971. The NLRB instituted proceedings in the United States District Court to secure a restraining order under Section 10(l) of the Labor Act (29 U. S. C. §160(l)). The District Court advised the parties that the injunction would issue on November 3, 1971. On the same date

petitioner seamen's unions established the picket line which is in issue in this case (App. 68a-70a).*

The pickets patrolled initially at the gates of the Alabama State Docks and subsequently at the gangways of the foreign flag ships (App. 6a-7a). The effect of the picketing was to cause longshoremen not to cross the picket lines and not to load or unload the ships (App. 8a-9a). It prevented the members of the Mobile Steamship Association from carrying out their agreements with the shipowners to load and unload the ships (App. 72a-75a). There was ample evidence to suggest that, notwithstanding the language of the picket signs and the fact that they were addressed "to the public," the purpose and intention of the picketing was to prevent foreign ships from being loaded or unloaded in the port of Mobile.

The Litigation

After a hearing in which evidence was submitted chiefly in the form of affidavits, the Circuit Court of Mobile County issued an order providing that a temporary injunction would issue upon the complainants' posting a bond of $5,000 conditioned to pay all damages and costs of the unions if the injunction were dissolved. The court made no findings of fact or conclusions of law. The unions did not seek a full hearing or a final judgment, nor have they moved to dissolve or modify the temporary injunction. Instead they appealed the interim order. They also applied in the Federal district court for an order restraining the state court proceedings. The Federal district court denied the application, and the United States Court of Appeals for the Fifth Circuit affirmed. *American Radio Association* v. *Mobile Steamship Association, Inc.*, 483 F. 2d 1 (5th Cir. 1973).

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* All "App." references are to the Appendix in this case.

The Supreme Court of Alabama affirmed the granting of the temporary injunction, 291 Ala. 201, 279 So. 2d 467 (1973). On the constitutional question, it determined that the lower court could validly consider the economic effects of the picketing and stated:

> "We have no reason to assume otherwise than that the trial judge, in the exercise of the wide discretion accorded him in a matter of this kind, gave close heed to the issues involved, and concluded that while a substantial question remained to be decided, the immediate circumstances obliged him to order the temporary writ." 279 So. 2d at 476.

Without attempting to second guess the trial court as to the precise basis of the possible wrongfulness of the picketing, the Supreme Court of Alabama held, after reviewing the evidence, that the trial court had not abused its discretion by issuing the temporary writ.

Summary of Argument

The temporary nature of the relief granted, and the absence of a trial court opinion reciting either the facts found or the legal conclusions reached, make this an inappropriate occasion for the resolution of important First Amendment questions.

Picketing which involves pure communication is entitled to protection as speech. Picketing which serves as a signal for the application of economic pressure to those picketed is action, and is no more entitled to free speech protection than any other type of action. Given the meager record in this case, it is impossible to determine that the picketing was pure communication, and impossible, therefore, to conclude that the Alabama courts could not temporarily enjoin the picketing without running afoul the federal constitution.

ARGUMENT

I

This Court should not consider the constitutional questions of this case in the absence of a full record and a final judgment.

We believe that this case is not at a stage where this Court should rule on the constitutional power of the Alabama courts to restrain the picketing in question because there is no final judgment and no findings of fact or conclusions of law on which to make such a ruling. *See AFL* v. *Swing*, 309 U. S. 659 (1940) (in which this Court denied certiorari at a stage of that case where a temporary injunction had issued but no final judgment) and *Taggart* v. *Weinacker's, Inc.*, 397 U. S. 223 (1970).

The case at bar differs significantly from *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), where this Court did review a temporary injunction which had been issued after a full hearing and which was accompanied by detailed findings of fact by the trial court. *See Keefe* v. *Organization for a Better Austin*, 115 Ill. App. 2d 236, 253 N. E. 2d 76, 78-79 (1969). This Court noted in *Keefe* that there was no "indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality." 402 U. S. at 418 n.

In the present case there are facts in dispute, particularly as regards the purpose of the picketing, and the issuance of a permanent injunction either with the same

wording as the temporary injunction or with different wording, is not a foregone conclusion.

The constitutional question should be resolved only after the benefit of a full hearing and a final order based on conclusions of fact and law.

II

The picketing in the case at bar is not constitutionally protected free speech.

It is clear that a generic prohibition of picketing violates the First and Fourteenth Amendments of the Constitution. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). It is also clear that picketing which involves pure publicity or communication and nothing more is entitled to the same protection as speech. An example of such picketing is peaceful picketing of a state capital in support of civil rights. *See Edwards* v. *South Carolina*, 372 U. S. 229 (1963). On the other hand, picketing by organized labor ordinarily (but not always) involves something more than communication. Frequently the communication aspect of picket signs is realistically irrelevant and the purpose of labor picketing is to cause organized labor to boycott the target employer and through such economic pressure, rather than through any appeal to the rational processes of the public, to achieve the union's goal. The economic pressure is possible because of long standing customs of solidarity and discipline within the labor movement backed by taboos against crossing picket lines, by fear of violence or social ostracism and by the fact that a union member who crosses a picket line is normally subject to fines and other discipline by his union. Thus a union picket line is ordinarily a boycott signal when it is located in the path of union labor providing supplies or services to the

target employer, quite irrespective of the contents of the picket signs.*

The starting point for the consideration of state power over picketing as conduct is the often-cited concurring opinion of Mr. Justice Douglas in *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769, 776-777 (1942):

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

This language was followed and expanded on in the later cases of *Giboney* v. *Empire Storage and Ice Company*, 336 U. S. 490 (1949); *Hughes* v. *Superior Court*, 339 U. S. 460, 464-465 (1950); *Building Services Union* v. *Gazzam*, 339 U. S. 532 (1950); *Plumbers Union* v. *Graham*, 345 U. S. 192, 201 (1953).

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*". . . (T)here is a fundamental difference between most labor picketing and most non-labor picketing. Labor picketing normally has a special kind of economic impact, derived from its institutional setting. An employer who is picketed is usually sealed off from many economic contacts by the tradition that union labor will not cross the picket line. This form of pressure is applied by closely knit, powerful organizations, with membership in the thousands or hundreds of thousands and a nationwide network of affiliates. It is supported by a system of power based upon common economic interests, loyalties, social pressure, economic sanctions, and bureaucratic force. A labor picket line is thus not so much a rational appeal to persuasion as a signal for the application of immediate and enormous economic leverage, based upon an already prepared position. As such it must, under ordinary circumstances, be classified as action, rather than expression.

T. Emerson, The System of Freedom of Expression 445 (1970). See also Emerson, *Toward a General Theory of the First Amendment* 72 Yale L. J. 877, 939 (1963).

In *Giboney* this Court stressed the effect of the picketing on the target employer:

> "About 85% of the truck drivers working for [the employer's] customers were members of labor unions. These union truck drivers refused to deliver goods to or from [the employer's] place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member."
>
> "Because of the foregoing . . . the picketing had an instantaneous adverse effect on [the employer's] business. It was reduced 85%." 336 U. S. at 493.

The Court concluded that:

> "[The union's] power with that of their allies was irresistible. And it is clear that [the unions] were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel [the employer] to abide by union rather than state regulation of trade." 336 U. S. at 503.

In no case involving utilization of a union's economic power to trigger a boycott of organized labor wherein unionized employees of third parties refuse to service the business needs of the target employer has this Court declined to uphold restrictions on picketing the purpose or effect of which conflicts with federal or state policy. This Court, moreover, has never held that a state or federal government is constitutionally barred from making conduct illegal merely because it involves speech.

> ". . . (I)t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney, supra,* 336 U. S. at 502.

Where, on the other hand, labor picketing has involved substantially pure communication, without the signal effect referred to by Professor Emerson of initiating a boycott of the target employer by organized labor, or where state regulation is applied to restrict pure communication picketing, this Court has been particularly careful to balance the social or economic policy behind picketing limitations against the degree by which the pure communication element of picketing is restricted in the particular circumstances. See *e.g., Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968).

Petitioners argue in point II of their brief that the picketing in this case involved nothing more than an appeal to the public to "ship American" * and as such constituted the lawful exercise of protected fundamental rights of free speech. If the picketing had been nothing more than an appeal to the public, and if it had not had the intended and actual effect of triggering an immediate refusal by longshoremen to cross the picket lines and load or unload the ships, we would agree with Petitioners.

Petitioners assert that the picketing in this case is identical to that in *Logan Valley Plaza, supra,* where this Court held that the state's trespass laws could not be applied in such a way as to prevent the communication of ideas to patrons of a supermarket. But the picketing in *Logan Valley Plaza* took place in the parcel pickup area frequented by customers and its sole purpose was to ask

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* In the light of Mr. Neira's testimony cited by the Alabama Supreme Court and the statements of the unions' lawyer at the hearing, (App. 128a-129a) this assertion is at best open to dispute.

customers not to patronize the store. Nothing in the opinion suggests that it was intended to or that it did interfere with services provided by union labor to the store. It was not a signal to organized labor to cease performing services for or making deliveries to the store.

The record in the case at bar contains ample evidence from which a court could conclude that the purpose of the picketing in Mobile, notwithstanding the language on the picket signs, was to block foreign ships from being loaded or unloaded so that shippers would be forced to use American vessels unless at least the foreign shipowners were to raise the wages of their foreign crew to American levels. This may or may not be conduct which it is wise for a state or indeed the federal government to regulate, but on such a finding, the speech element could realistically be viewed as immaterial and might even be viewed as an attempt by careful planning of details by the unions to bring under the protective mantle of free speech economic conduct which would otherwise clearly be susceptible of regulation.

Petitioners have argued that a prerequisite for state regulation of picketing is that such regulation must seek to implement a valid public policy and that the action of the Alabama courts is invalid because they did not define the public policy involved (Pet. brief, p. 22).

We submit that, within the framework of this Court's previous decisions, a state is free to develop either by the judicial process or by legislation its policies regarding the lawfulness or unlawfulness of picketing in particular circumstances. We believe that this Court's approach to the constitutional question in this case should be tempered by the fact that the case involves merely an interim order and that the courts of the State of Alabama should have the opportunity of expressing that State's policy in a

final judgment containing conclusions of law and findings of fact.

We believe that the Alabama court was constitutionally justified in upholding the granting of a temporary injunction in the circumstances. The fact that the lower court did not make findings of fact or conclusions of law in the interim proceedings did not provide the Alabama Supreme Court, nor does it provide this Court, with any basis for concluding that there is no valid policy on which the Alabama courts could properly render a final judgment enjoining the picketing in this case.

In *Hughes* v. *Superior Court, supra,* this Court made it clear that it would not try to establish the constitutional boundary line between the competing interests of society involved in the use of picketing with general phrases, (339 U. S. at 466) and that a state has great discretion within the Constitution in determining whether to regulate picketing and, if so, what form and scope the regulation should take. *Hughes* makes clear that it is constitutionally immaterial whether a state's policies are formulated and defined by its courts or by its legislature. *Id.* at 466-468.

Of all the cases decided by this Court concerning the relationship between picketing and free speech, none is more relevant to the case at bar, both in the context of its factual setting and in the guidance to be derived from the majority opinion written by Mr. Justice Frankfurter, than *Teamsters Union* v. *Hanke*, 339 U. S. 470 (1950). In that case, the union picketed in protest that two self-employed car dealers were keeping their business open beyond the business hours which the union had negotiated with other car dealers.* The picketing was peaceful, but

* Such picketing has many similarities with the picketing in the case at bar, where the unions were protesting that the wages paid to foreign crews on foreign ships were less than those negotiated by the union with the owners of American ships.

it triggered a refusal by drivers for supply houses to deliver parts and other needed material to the car dealers.

This Court stated:

> "Here, as in *Hughes* v. *Superior Court* . . ., we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. . . . The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the state to set the limits of permissible contest open to industrial combatants'. . . . A state's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment comes to this Court bearing a weighty title of respect." *id.* at 474-75.

The opinion went on to comment that the case presented a glaring instance of the interplay of social-economic interests. "On the one hand Unions obviously are concerned not to have union standards undermined by non-union shops." *id.* at 475.* On the other hand there was an interest in preserving the economic units against whom the picketing was directed.

> "Whether to prefer the union or the self-employer in such a situation, or seek partial recognition of

* The unions in the *Windward Shipping* case contended that the picketing in that case, which was identical to that in the case at bar, was essentially area standards picketing to protest that foreign ships paying lower wages were undermining the standards of American seamen on American ships. See *Brief for Respondents in Opposition* in that case pp. 10-12.

> both interests, and, if so, by what means to secure such accommodation, obviously presents to a State serious problems. There are no sure answers, and the best available solution is likely to be experimental and tentative, and always subject to the control of the popular will. That the solution of these perplexities is a challenge to wisdom and not a command of the Constitution is the significance of [the *Senn* case]" *id.* at 475-76.

The Court held:

> ". . . we cannot conclude that [the state], in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that [the state] has offended the Constitution" *id.* at 478-79.

We think that it would be within the constitutional power of Alabama, or of the Federal government, to regulate and restrain any picketing which is intended to and does have the effect of triggering a boycott by organized labor which causes unionized employees of third parties to refuse to service the business needs of the target employer. We see no essential constitutional difference between a government's right to regulate the initiation of boycotts arising from an understanding between union allies and its undoubted right to regulate the initiation of boycotts arising from an understanding between business allies. This is what Alabama was doing when it temporarily enjoined picketing conduct which interfered with the contractual relationships between the stevedoring companies and the foreign shipowners. The interference

involved in the case was that the picketing of the ships triggered a boycott by the unionized longshoremen, who refused to load or unload the ships. Had the picketing merely involved an appeal to shippers not to patronize foreign ships, without an intended triggering effect on organized labor, the constitutional situation would have been very different.

We believe that a state or federal government could constitutionally prohibit so-called "area standards" picketing which triggered such a boycott on any number of valid social or economic considerations: for example, the harm done to the target employer, its employees, or competition generally; or that such picketing is inconsistent with the right of the employees of the target company and their own union, if they have joined one, to negotiate their own wage structure without interference by an outside union. The solution to such questions is, in the words of Mr. Justice Frankfurter in *Hanke*, "a challenge to wisdom and not a command of the Constitution."

Similarly, Alabama courts could determine that the social and economic interests of the state in having foreign ships trading in and out of its ports, carrying the produce of its citizens to market and bringing in the products needed by its citizens, outweighs the interest of American seamen's unions in causing these ships to be boycotted by longshoremen and other union labor because the wages paid to the foreign crews on such ships are less than those of American seamen. In the present case the Alabama courts could find that the communication element of the picketing was not a material element in the light of the evidence of its purpose and effect and the circumstances in which it took place, including the fact that the commencement of the picketing coincided precisely with the announcement by the Federal district court that an injunction would be issued against a strike being carried on by the very longshoremen who then refused to cross the picket lines established by the seamen's unions.

Conclusion

We submit that the granting of the preliminary injunction should be affirmed and that the case should be remanded for further proceedings. We do not believe that this Court should rule on the constitutional questions until such time as the case reaches the stage of a final judgment in which the basis of the Alabama policy is set forth.

Respectfully submitted,

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